IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978
Nos. 78-606, 78-607

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,

Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et al.,

Respondents,

GENERAL TELEPHONE COMPANY OF CALIFORNIA,

Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et al.,

Respondents.

REPLY TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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TOPICAL INDEX

	Page
Table of Authorities	ii
QUESTION PRESENTED	2
INTEREST OF THE UNITED STATES	3
STATEMENT	6
DISCUSSION	8
CONCLUSION	20

APPENDIX A - ANSWERING BRIEF OF THE ADMINISTRATOR OF GENERAL SERVICES AND THE SECRETARY OF DEFENSE, Application No. 53587, Filed DEC 26, 1973, ATTACHMENT A., pages 1-8

APPENDIX B - Pages 5-7 of the Supplemental Brief of the Secretary of Defense filed with the PUC on July 5, 1974, pages 5-7

TABLE OF AUTHORITIES

Cases	Page
Carolina Power and Light (Federal Energy Regulatory Commission) 15 Federal Power Service 5-619 (August 2, 1978)	16
City of Los Angeles v. Public Utilities Commission 15 Cal.3d 680 (1975) R. App. A, 16RA-51 RA	7, 12, 17
City of San Francisco v. Public Utilities Commission 6 Cal.3d 119 (1971) R. App. A, 1 RA-16 RA	7, 17

Statutes

Internal Revenue Code	
§ 46(f)	16
§ 167(1)(2)(B)	17
§ 167(1)(2)(C)	18

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Respondents, the City and County of San Francisco, the City of Los Angeles, and the City of San Diego (Cities), on November 10, 1978, served their "Brief in Opposition to Petitions for Writ of Certiorari" in No. 78-606 and No. 78-607.

On November 13, 1978, the Cities received the "Memorandum for the United States as Amicus Curiae" (hereafter cited as Solicitor General's memo). The instant "Reply" is the first opportunity for the cities to respond to that document.

QUESTION PRESENTED

78-606: Petitioner Pacific Telephone and Telegraph Company (Pacific) contends at Pet. pages 2-3 that the rate making methods adopted by the PUC and approved by the California Surpeme Court are in violation of the Supremacy Clause of the United States Constitution and deprive Pacific of Fourteenth Amendment Rights.

78-607: Petitioner General Telephone Company of California (General), via footnote at page 2 of its Petition, adopts Pacific's Fourteenth Amendment argument, but did not adopt the Supremacy Clause argument. It asks the Court to issue an opinion on the question of whether the rate making methods adopted by the California Supreme Court will deprive General of its eligibility under the Internal Revenue

Code to continue the use of accelerated depreciation and the investment tax credit (JDIC).

The Solicitor General's Memo solely addresses itself to the eligibility question raised by General. Although nominally the memo is in response to the petitions in No. 78-606 and No. 78-607, the memo never discusses the questions raised in No. 78-606. The memo itself is clearly irrelevant to No. 78-606.

INTEREST OF THE UNITED STATES

This topic appears at pages 2-4 of the Solicitor General's memo. The Cities recognize that the United States has a significant interest in the instant proceedings. Agencies of the United States frequently appear before the California Public Utilities Commission (PUC). The United States is a major utility customer and like all other customers it has an interest in the rates adopted by the state agencies. It has a right (if not a duty to taxpayers) to insure it does not pay excessive rates.

With respect to the rate making treatment for accelerated depreciation, the attorneys representing the Administrator of General Services and the Secretary of Defense have appeared before the PUC on behalf of the consumer interests of all the executive agencies of the United States.1/

Although the United States does have a legitimate interest in the intrastate rate making questions before this Court, these interests are never even implicitly represented by the Solicitor General.

1/ The following filings are particularly relevant:

1. Answering Brief of the Administrator of General Services and the Secretary of Defense on Behalf of the Consumer Interests of All the Executive Agencies of the United States, Application No. 53587, December 26, 1973.

2. Supplemental Brief of the Secretary of Defense on Behalf of the Consumer Interests of the Executive Agencies of the United States, Application No. 53587, July 5, 1974.

3. Petition for Rehearing by Department of General Services, Application No. 53587, August 12, 1974.

The Solicitor General's memo solely represents the interests of the petitioner utilities. In the conclusion of the "Interest of the United States" section, at page 4, the Solicitor General expresses concern about a potential "enormous hardship upon the public utilities sector of the economy". At page 9, the Solicitor General makes it clear that his interest is not related to concerns of the federal government, but that the cases present questions of "enornous potential fiscal significance to regulated public utilities". The Solicitor General concludes his brief at page 13 by stating that "the financial stability of all regulated public utilities in California" is threatened.2/

The Solicitor General may have heartfelt concern for utilities such as Pacific

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2/ The fears expressed by the Solicitor General, in the instant case, are similar to those expressed by Pacific to the California and United States Supreme Court, respectively, in previous years. Each time these fears have been proven to be unfounded. (See Respondent's Breif in Opposition For Writ of Certiorari, at pp. 21-22.)

and General. This concern is not an interest of the United States.

The Cities cannot and will not present the position that should have been presented based on the bona fide interests of the United States. We will inform the Court what agencies of the United States have in fact told the PUC. We will contrast the statements by agencies of the United States, representing the interest of the United States, in briefs to the PUC with the position of the Solicitor General in his advocacy of the utilities' interests.

STATEMENT

The Solicitor General's "Statement", pages 4 through 8, begins with an erroneous assumption and retrogresses from that point. The "Statement" section commences at page 4, "These state public utility rate making cases uniquely present legal questions that solely involve the proper interpretation of two federal tax statutes."

The Cities, in their brief, have described at length the background of the cases before the Court. (Cities' Brief, pp. 3-9) The cases themselves involve intrastate rate making criteria under California law. No analysis of these cases could be made without specific analysis of the factual background and the California rate making criteria provided to the PUC by the California Supreme Court in City of San Francisco v. Public Utilities Commission 6 Cal.3d 119 (1971), R. App. A, 1 RA-16 RA, and City of Los Angeles v. Public Utilities Commission 15 Cal.3d 680 (1975), R. App. A, 16RA-51 RA. These cases will hereinafter be cited as San Francisco and Los Angeles II.

The Solicitor General fails to cite these cases anywhere in his memo. These cases make it apparent that because of imprudence and obstinancy of the utilities, rates could be set "notwithstanding changes in the federal tax statute." San Francisco at 11 RA. The PUC's decision was sustainable by the California Surpeme Court irrespective of the tax eligibility question. This point was argued in the Cities' brief at pages 11-13.

The Solicitor General's "Statement" is simply not relevant to the facts and the legal issues in the California cases. The Solicitor General carefully avoids any analysis of the factual and legal background of these cases. These omissions convert the Solicitor General's "Statement" into a misstatement and enable the Solicitor General to transform a narrow intrastate rate case into a broad federal tax case.

DISCUSSION

The Solicitor General's "Discussion" is in three parts: 1. Accelerated Depreciation, at pages 9-12. 2. Investment Tax Credit, at pages 12-13, and 3. Concluding plea on behalf of the utilities, at pages 13-14.

Accelerated Depreciation

The utilities seek ineligibility on the premise that the PUC has made an excessive rate base exclusion (General Pet., p. 12). The Solicitor General begins his discussion of the actual eligibility issue at page 11. His initial

statement at page 11 is correct: "The statute is silent as to how the deferred tax reserve is to be treated for rate making purposes." Recognition of this point should have led the Solicitor General to conclude that the rate base treatment of the reserve could not impair eligibility. If the Solicitor General had the slightest doubt, the statutory history makes it patently clear that there was no intent to predicate eligibility on rate base treatment. Relevant statutory history was cited at Cities' Brief, p. 19.

Attorneys representing the United States' interests have told the PUC, that eligibility could not be impacted by rate base treatment. "We vehemently dispute that Section 441 of the Act speaks at all to the subject of rate base computations" Answering Brief of the Administrator of General Services and the Secretary of Defense on Behalf of the Consumer Interests of All the Executive Agencies of the United States, Application No. 53587, December 26, 1973, at page 41. (GSA - Defense Brief)

The GSA - Defense Brief explained in detail that eligibility could not be predicated upon rate base treatment. The Brief, in its Attachment A at page 8, concluded that if the IRS adopted regulations that predicated eligibility upon rate base treatment such regulations would be "illegal".3/

After recognizing the lack of statutory authority to restrict rate making treatment at page 11, the Solicitor General concludes, "The Commission's AAA method of accounting runs afoul of this explicit prohibition of the Regulations." This is a factual error. The methodology adopted by the PUC specifically complies with the regulations of the IRS. The regulation cited by the Solicitor General at page 11 solely requires that there be a matching of the test year for purpose of tax reserve rate base deduction and tax expenses. The PUC has specifically followed this methodology.

3/ Attachment A of the GSA - Defense Brief is reprinted in full as Appendix A to this Reply (pages A-1 through A-8).

> "As a result of each of the deductions from rate base federal tax expense will be recomputed on the same basis in a test year for the test year and the three corresponding subsequent years, thus matching estimated tax deferral amount for each period with the estimated federal tax expense for the same period. This method complies with Treasury Regulation 1.167(1)-(1) (h)(6) and is normalization accounting." (Dec. 87838 Finding 3 P. App. B,45A thru 46A)

This methodology, which the Solicitor General questions in his brief, was specifically claimed to be consistent with the tax regulations in the Supplemental Brief of the Secretary of Defense on Behalf of the Consumer interests of Executive Agencies of the United States filed with the PUC on July 5, 1974.4/ In analyzing the relevant regulations, the Secretary of Defense stated at page 5,

> "The period to be used to determine the deferred income tax reserve must only match the period used for determination of income tax expense, not the test period used for rate making purposes."

4/ The analysis at pp. 5-7 of the July 5, 1974 Brief is reprinted in Appendix B of this Reply (pages B-1 through B-4).

The PUC did not follow the recommendations of the Secretary of Defense when it issued Decision No. 83162. In response to that decision, the Cities filed a petition for rehearing. Among other points we challenged the fact that the rate making methodology adopted would result in a significant windfall to Pacific due to failure to properly take into account in rate base exclusion the normalization reserve. (Pet. Rehearing, pp. 5-7) On August 12, 1974, the Department of General Services filed a petition for rehearing and stated that it fully supported and adopted the joint petition for rehearing of the Cities.

The PUC, as it had so often in the past, rejected the arguments of the Cities and the federal government. The Cities again appealed to the Caliofrnia Supreme Court. For the third time, in Los Angeles II, a unanimous California Supreme Court annulled the accelerated depreciation portion of the decisions of the PUC.

In Decision No. 87838 (Pet.App.B), the PUC adopted a rate making method similar to that described by the Secretary of

Defense in Appendix B. This rate making method is consistent with IRS regulations and California rate criteria. It would be valid even if it did not conform to IRS regulations. The federal agencies, through their attorneys, told the PUC that IRS had no authority to predicate eligibility upon rate base treatment. (Rep. App. pp. A-1 thru A-8)

The Solicitor General's factual and legal analysis of accelerated depreciation is clearly erroneous and inconsistent with the legal analysis of the federal agencies who actually participated before the PUC.

2. Investment Credit. The Solicitor General's discussion of this issue appears at pages 12 through 13. In the case of accelerated depreciation, the Solicitor General avoided the statutory language and made reference to the regulations. In the case of JDIC, the Internal Revenue Service has been incapable of producing regulations. The Cities' analysis of JDIC is at page 20 of our brief and will not be repeated herein.

3. Plea for Utilities. The Solicitor General's concluding section is divided

into two paragraphs. The first paragraph, at page 13, properly recognizes that there is no conflict of decisions and therefore certiorari should not normally be granted. The second paragraph at pages 13 through 14 asks the Court to grant certiorari due to a fear of the potential financial impact on the utilities. The Solicitor General is clearly wrong in his analysis of the financial impact of the decisions. However, financial impact in no way provides jurisdiciton for certiorari. These paragraphs will be analyzed separately.

In the first paragraph, at page 13, the Solicitor General properly recognizes that there is no conflict of decisions and no basis to grant review under the Court's normal criteria. A fair analysis would be that there is not even a single decision, let alone a conflict of decisions, subject for review by the Court.

There is no dispute to which the Internal Revenue Service is a party. At page 4, the Solicitor General refers to a conflict between the "Treasury and the

state regulatory commission". There is no conflict. The IRS is not challenging the PUC in any tribunal. The PUC is not challenging the IRS in any tribunal. The IRS is not challenging Pacific or General in any tribunal. We simply have a case of a request for an advisory opinion. We submit there is no jurisdiction over this type of case.

Federal agencies undoubtedly would like someone, and in particular the Supreme Court, to interpret the law for them. With respect to accelerated depreciation, the IRS has conflicting standards. The actual audits of Pacific--for 1970-1973 by the IRS--produced no assessments. In responding to Pacific's request to be declared ineligible for the use of accelerated depreciation, Mr. Geoffrey Taylor writes a letter agreeing that there will be ineligibility. (Pet.App. D)

The attorneys representing the United States are clearly confused. The attorneys who participated in intrastate rate cases representing the interests of the United States advocate the method of rate making which the Solicitor General, in

representing the utilities' interests, now questions.

The IRS is even more confused on the issue of JDIC. Internal Revenue Code Section 46(f) was passed in 1971. The IRS has been unable to issue clarifying regulations. (P.App. E, 134A) Mr. Geoffrey Taylor issued several letters declaring that ineligibility will result if certain actions are taken. (R. App. D, p. 78RA) The Federal Energy Regulatory Commission found that Mr. Taylor has erred in his interpretation of the law. (FERC, Carolina Power and Light, Docket No. ER-76-494 (Phase II), Opinion 19, August 2, 1978, 15 Federal Power Service 5-619.) The IRS audits of Pacific confirm JDIC eligibility despite the fact that Pacific's rates are set out of conformity with the Taylor methodology.

The federal government is confused. The confusion of the IRS and the Solicitor General is no jurisdictional basis to grant a petition for certiorari. There is no case or controversy and all the Solicitor General seeks is an advisory opinion on the interpretation of a federal statute.

The Solicitor General, on behalf of the utilities, asks the Court to grant the petitions because he believes there will be a significant financial impact on "all regulated public utilities in California" and "other similarly situated companies" (p. 13). This statement is in error.

The limited impact of the intrastate California decisions was discussed in the Cities' brief at pages 21-23. The PUC decisions are only relevant in California to Pacific and General. Of all the utilities in California, only Pacific and General were imprudent in failing to adopt accelerated depreciation with flowthrough prior to the passage of the Tax Reform Act of 1969. (San Francisco fn. 3, 8 RA, 12RA.) This has significant factual and legal implications. The rate making treatment for Pacific and General is predicated upon the obstinancy and imprudence of Pacific and General. (San Francisco 11RA-15RA, Los Angeles II, fn. 12, 27RA)

The eligibility issue for Pacific and General arises only because Pacific's and General's tax status is predicated on Internal Revenue Code Section 167(l)(2)(B)

(P.App. C, 80A). This section permits Pacific and General to use accelerated depreciation only "if the taxpayer uses a normalization method of accounting". The prudent utilities in California (all but Pacific and General) which used accelerated depreciation with flowthrough prior to the passage of the Tax Reform Tax Act of 1969, are eligible to use accelerated depreciation pursuant to Section 167(1)(2)(C). This section provides that a utility may use accelerated depreciation "if, with respect to its pre-1970 public utility property of the same (or similar) kind most recently placed in service, the taxpayer used a flowthrough method of accounting for its July 1969 accounting period." The other California companies need not use the normalization method of accounting to be eligible for accelerated depreciation. This case has no impact on the tax eligibility of other California utilities.

The Solicitor General at page 13 expresses concern about potential impact on "similarly situated companies" outside of California. We are unaware of the extent

of managerial imprudence and obstinancy throughout the country. In any case, whatever is adopted by California for Pacific and General is not binding in any way on other states.

The Solicitor General can point to no specific detrimental impacts of the PUC decisions. He can only speculate about potential problems for the utilities. (Solicitor General memo, pp. 3, 9, and 13; see footnote 2, p. 3 of this reply.) Regardless of the impact of the Commission decisions on the utilities, the issuance of an advisory opinion cannot be justified.

CONCLUSION

The plea of the Solicitor General on behalf of the utilities should be rejected and the petitions should be denied.

Respectfully submitted,

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APPENDIX A

LACK OF AUTHORITY TO ISSUE THE REGULATION

Judicial decisions regarding the validity of regulations issued by the Commissioner are multitudinous. The general standard can be stated in several different ways. Merten's Law of Federal Income Taxation, Volume I, Sec 3.21, states:

> The Treasury may not make an arbitrary or unreasonable Regulation, nor can it restrict or enlarge the scope of a statute. (Emphasis added)

47 CJS, Internal Revenue, Sec 48 states:

> However, to be valid, the rule or regulation must be reasonable, and must be consistent with the statute implemented, or not in conflict with the statute implemented as judicially construed. Moreover, the regulation must be confined within the general scope of the statute. (Emphasis added)

Some particularly pertinent language appears in Arkansas - Oklahoma Gas Co. v. Commissioner of Internal Revenue, 201 F.2d 98 (8th Cir: 1985):

> The Commissioner has no more power to add to the Act what he thinks Congress overlooked than he has to supply what Congress has deliberately omitted.

The preceding quotations appropriately frame the issue with regard to the proposed regulation. That is, does it impose a restriction not contained in the Act and thereby in effect enlarge the scope of the Act.

A. Primary Purpose Section 441 of the Act was to Prevent Tax Loss

House Report (Ways and Means Committee) No. 91-413, August 1969 (To Accompany H.R. 13270), in Part R, noted that at that time "about half the regulatory agencies require utilities that use accelerated depreciation for tax purposes to 'flow through' the reduction in Federal income taxes currently to the utilities customers." The report further noted that: (1) the "trend of recent years has been that regulated utilities previously on straight line depreciation have been shifting to various forms of accelerated depreciation"; (2) "at the same time, regulatory agencies which had previously permitted ... (normalization), have been shifting toward requiring (current flow throught)"; and (3) "several agencies have imputed accelerated depreciation in determining the Federal income

tax expense of the utilities, and flowed through the resultant tax deferrals, even though the particular utilities were in fact using straight line depreciation and in fact were paying greater current Federal income taxes...."

The Report also noted the fact that flow through results in a current tax revenue loss of approximately twice the amount of tax deferral and that this could shortly be a revenue loss of $1.5 billion to $2 billion and stated that: "Your committee has determined that the likely revenue loss from wholesale shifts to accelerated depreciation and flow through is unacceptable at this time. (Emphasis added) Senate Report (Finance Committee) No. 91-552, November 21, 1969, contains an almost identical discussion regarding Section 441 of the Act.

Thus it becomes abundantly clear that the sole purpose of this section of the Act was to protect the Treasury from a large revenue loss as the result of flow through. The action taken was to effectively freeze the status quo and as to old property freeze a utility to its

current method of depreciation that it had been taking, and as to new property permitted accelerated depreciation only if the regulatory agency concerned permitted normalization of the deferred taxes. This, of course, means that the regulatory agency must (in determining cost of service) allow as an expense, the deferred taxes. In light of the tremendously adverse effect upon a utility's revenues, which would result from rates set upon a flow through basis and taxes being paid on a straignt line basis, regulatory agencies are effectively compelled by practical considerations to allow normalization. Thus Congress did not directly prohibit regulatory agencies from requiring or imputing flow through as had been the approach in H.R. 6659 (91st Congress) probably because of the Constitutional implications as noted by Chairman Mills who stated:

> I understand your legal point, that we have no right to tell you how to fix rates on intrastate matters in the State of California. I agree with you, that that would be an invasion of your right.

> Hearings on HR 6659, House Committee on Ways and Means, pg 3887, 91st Congress (1969).

While Section 441 may be as Constitutionally infirm as was H.R. 6659, it appears that Congress in trying to stem the revenue loss resulting form flow through, in both H.R. 6659 and in Section 441, directed its action only toward cost of service for ratemaking purposes, which is the only aspect of ratemaking which is affected by flow through and normalization.

B. Congress did not legislate regarding rate base. Congress did legislate with regard to income tax implications of regulatory treatment of taxes for the purpose of determination of cost of service for utilities, and if Constitutional, this may be a proper area for clarifying regulations, in light of the various methods of computing accelerated depreciation, and in light of the difference between FCC prescribed lines of property and tax lines. However, Congress appears to have specifically avoided any attempt to control directly or indirectly the treatment to be accorded by regulatory

agencies to any deferred tax reserve which would result from normalization. The House Report specifically noted that:

> Where normalization is used, this bill in no way diminishes whatever power the agency may have to require that the deferred taxes reserve be excluded from the base upon which the utility's permitted rate of return is calculated. (US Code Congressional and Administrative News, 91st Congress, 1st Session, pg 1784).

The Senate report contains a similar statement of lack of intent. (U.S. Code Congressional and Administrative News, 91st Congress, 1st Session, pg 2205).

Thus it appears abundantly clear that Congress neither attempted to control, either directly or indirectly, the ratemaking authority of regulatory agenices to deal with the ratemaking treatment to be accorded the deferred tax reserve, as a condition precedent to being allowed to claim accelerated depreciation for Federal income tax purposes. This is, of course, understandable. To do so could be viewed as an invasion into the perogative of the states, prompt the possibility of judicial challenges, and in view of

the very small revenue effect which various ratemaking techniques might have on revenues, it was really not that much of a concern. The possible loss of $.15 per dollar of deferred taxes is much different from the loss of $2.00 per dollar of deferred taxes.[1/]

While this analysis is helpful in determining the extent of the intent of Congress, it unquestionably obtains, that Congress in determining and legislating as to what conditions must obtain before a utility is considered to normalize, addressed itself only to the subject of cost of service, and clearly avoided the subject of rate base.

1/ While each $1.00 of deferred taxes which is flowed through becomes a $2.00 tax loss, any error in computing the deferred tax reserve, which may be either deducted from rate base or treated as no cost capital in the capital structure, results in only a gain or loss of revenue to the utility (none to the treasury directly) of only $.15 on the dollar. Thus if the tax reserve is over or underestimated it results in only $.15 or thereabouts in revenue gain or loss per dollar. This $.15 represents the rate of return authorized to the particular utility plus the associated taxes on the eranings on common equity.

Judicial decisions concerning the regulation making authority of the Commissioner are legion and clearly in point here. In Busey v. Deshler Hotel Co., 130 F.2d 187 (6th Cir., 1942), the court said.

> To become binding, interpretive regulations must be reasonable and in furtherance of the intent of Congress, as evidenced by its Acts. Where the language of a taxing statute is plain and unambiguous, there is no occasion for resort to interpretive proclamations of the Treasury Department. Neither the administrative officers nor the courts may supply omissions or enlarge the scope of the statute. (Emphasis added)

In Smith v. Comm. of Int. Rev., 332 F.2d 671, 673 (9th Cir. 1964), the court said:

> The Commissioner may not prescribe any regulations which are not consistent with the statute; or which may add a restriction to the statute which is not there. (Emphasis added)

Another regulation was condemned in U.S. v. Marett, 325 F.2d 28, 30 (5th Cir., 1963) which said:

> This, it seems to us, is more than an attempt to put a 'gloss' on the regulatory requirement. It is an attempt to add a restriction to the statute which is not there. (Emphasis added)

Similar condemnations of regulations have been the subject of numerous court decisions, which will not be recounted here. Suffice it to say that, regulations issued by the Commissioner of Internal Revenue, must be confined to the scope of the statute and cannot add a restriction which Congress deliberately omitted. It is submitted that the proposed regulation, exceeds the scope of Section 441 in attempting to control the ratemaking treatment to be accorded the deferred tax reserve, a subject which Congress deliberately left in the hands of ratemaking agencies, and as a consequence would, if issued, be illegal.

Respectfully submitted,

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APPENDIX B

B.

POST SEPTEMBER 5, 1974 DECISIONS

Section § 1.167(l)-1(h)(6)(i) contains some very significant language. Speaking of the deferred tax return excluded from rate base, or treated as no cost capital, that paragraph states that the taxpayer does not use a normalization method of regulated accounting, if for rate making purposes, the amount of the reserve:

> ". . . exceeds the amount of such reserve for deferred taxes <u>for the period used in determining the taxpayers tax expense in computing cost of service for such rate making</u>." (Emphasis added.)

Voila! The period to be used to determine the deferred income tax reserve must only match the period used for determination of income tax expense, not the test period used for rate making purposes."

In subdivision (ii), it states:

> ". . . <u>if solely a historical period is used to determine depreciation for Federal income tax expense for ratemaking purposes . . .</u>" (Emphasis added.)

Again the emphasis is that the period

used for the computation of the deferred tax reserve must match the period used for the computation of the depreciation for Federal income tax expense.

Continuing on to Example (1) which follows, it says in pertinent part, that:

> "The year 1974 is the recorded test period for X's rate case and is the period used in determining X's tax expense in computing cost of service." (Emphasis added.)

This example certainly contemplates that the "test year" for all other purposes can be different than the test year utilized for determining Federal income taxes and the deferred income tax reserve.

V

CONCLUSION

From the foregoing, it can be readily seen that the only requirement of the regulations, as issued, is that the period used for the deferred income tax reserve be matched with the period used for income tax expense.

There is absolutely no requirement that the period used for revenues,

depreciation, and other expenses be coincident with the period used for taxes and the deferred tax reserve.

Consequently, the concept of a pro forma deferred income tax reserve is not impossible, it is not prohibited, but rather it is silently allowed. Silently in the sense that the regulations contain no specific example of its use or application. We are certain that this is not what Ma Bell wanted. But this is what has happened.

As a consequence, it clearly appears that two possibilities are present. First, if the decision in this, and the General Telephone Company case are issued before September 5, 1974, there is no question but what pro-forma normalization can be utilized. Second, as to future proceedings, the test year for revenues, depreciation, and other expenses need not be the same test year utilized for taxes and the deferred tax reserve, and in this sense, the deferred tax reserve can be on a pro-forma basis.

WHEREFORE, it is respectfully requested that this Commission:

1. Render a decision in this case prior to 5 September 1974, and consequently, avoid any question as to the utilization or a pro forma deferred Federal income tax reserve; or,

2. Reopen this proceeding in order to permit the Commission Staff and other interested parties to present evidence hearing upon the subject of the proper period to be utilized in this proceeding, for the purpose of determining Federal income taxes and the deferred Federal income tax reserve, which subject no party was on notice to address prior to the submission of this application.

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78
607